

The Obviousness of Anarchy: Accessibility of Rules Of Law - The Art of Not Being Governed

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Supporters of government claim that government must make the law in order for it to be accessible to the citizens to be governed by it. The government promulgates its legislation in statute books that are available to all citizens. The unenacted rules of common law, they claim, are unintelligible to the lay person. Consisting of rules abstracted from cases over long periods of time, the common law is known only to the judges and lawyers who deal with it as part of their profession. A system of law that requires citizens to hire attorneys merely to find out what the law is is obviously unacceptable.

The proper response to this is: Are you serious? Look around. Please! Can any human being possibly be aware of the myriad of arcane government regulations to which he or she is subject? Have you ever seen the Code of Federal Regulations? When was the last time you tried to prepare your income tax return? Critics of the common law contend that lay people would need professionals to tell them what the law is. Yet, year after year, studies demonstrate that even most professional tax preparers and IRS employees cannot understand what the United States tax code requires. The common law rule that protects citizens against unintentional injury is the requirement to exercise the degree of care a reasonable person would employ to avoid causing harm to others.



This is hardly inaccessible. Does anyone know what all the rules are that the Federal Trade Commission, the Consumer Product Safety Commission, and the National Highway Traffic Safety Administration have issued to accomplish the same end?

The common law consists of rules that have proven over time to be successful in resolving disputes. Only rules that are both intelligible to the ordinary person and correspond to the ordinary person's sense of fairness can achieve this status. Rules which are inaccessible to those to be

governed by them cannot be effective. This is why, for example, the common law rules of contract and commercial law specifically incorporate references to customary business practice and the duty to act in good faith.

It is also why no legal expertise is required to know that the law of self-defense permits one to use deadly force to repel a life-threatening attack, but not to shoot the aggressor after the immediate danger has passed. Understanding the traditional rules of common law requires only that one be a member of the relevant community to which the rules apply, not that one be an attorney.

Government legislation, in contrast, need have no relationship to either the understanding or the moral sensibility of the ordinary person. Legislation is law created through the political process. As such, it is inherently responsive to political considerations. Such considerations can, and frequently do, produce rules that are not intelligible to the ordinary person. This is not merely because special interests can skew the legislative process. Even if legislators were selflessly devoted to the common good, they would still need some principle of justice or moral ideal to guide their law-making.

But there is no guarantee that the measures necessary to effectuate such principles or ideals will

correspond to the understanding of the ordinary person. The Civil Rights Act of 1964 may have been the noblest legislative effort of our age, but the ordinary person is unlikely to understand why requiring pizza delivery men to be clean shaven constitutes illegal racial discrimination¹⁰ or how a company with a work force consisting of almost all minorities can nevertheless be guilty of discrimination.¹¹

Fraud, as it evolved at common law, consists of intentionally misrepresenting a material fact that another relies upon in parting with his or her property. It is not difficult for the ordinary person to appreciate that such action may be against the law. Fraud, as defined by federal legislation, consists of any scheme or artifice to defraud. It does not require a misrepresentation of fact. Any misleading statement or non-disclosure will do.

It does not require that anyone actually be misled or rely on the statement or non-disclosure. It does not require that anyone suffer any loss.¹² Martha Stewart was recently put on trial for securities fraud for the act of publicly declaring her innocence of insider trading.¹³ It is probably fair to say that the ordinary person would not know that Stewart's comments to the media constituted a federal crime.

I understand the argument that if we had a night watchman state whose legislation was limited to simple, clear rules that are designed to secure individual rights, the law would be perfectly accessible. There are only two problems with this argument. The first is that in such a case, the legislation would merely reproduce the basic rules of common law.

There is no need to create a government merely to publicize such rules. This can be, and is, done privately. The "restatements" of the common law are currently privately produced, easily accessible, and widely cited. The second is that it is impossible. The idea that there is a concise set of simple, clear rules that can preserve a peaceful, free society is a fantasy.¹⁴ This becomes apparent even with regard to the fundamental rules barring aggression as soon as one attempts to specify the conditions under which force may be used in self-defense or for the defense of others, or is excused by mistaken belief or insanity. And that is without considering that these fundamental rules must be supplemented by the rules of contract, property, and tort law that are necessary for people to coordinate their behavior well enough to engage in peaceful cooperation.

Legislation, even libertarian legislation, will either reproduce the common law or depart from it to gratify a political interest or realize some conception of justice. In the former case, it is precisely as accessible or inaccessible as the common law. In the latter, it will diverge from the common sense morality of the ordinary person, producing rules that are less accessible than the common law. Not only is government not necessary to ensure that the rules of law are accessible, it inevitably renders them less so.

Footnotes

10 See *Bradley v. Pizzaco of Nebraska, Inc.*, 7 F.3d 795 (8th Cir. 1993).

11 See *Connecticut v. Teal* 457 U.S. 440 (1982).

12 For a fuller account of the federal fraud statutes, see John Hasnas, *Ethics and the Problem of White Collar Crime*, 54 AMERICAN UNIVERSITY LAW REVIEW 579 (2005).

13 See Indictment, *United States v. Stewart*, 37 (S.D.N.Y. 2003) (No. 03 Cr. 717).

14 For more on this, see John Hasnas, *The Myth of the Rule of Law*, 1995 WISCONSIN LAW REVIEW 199 (1995).

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